APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
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> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *
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Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 401. REVOCABLE TRUSTS.
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> Section 302 (d) of the Revenue Act of 1926 is amended to read as follows:
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> "(d) (1) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the

decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

"(2) For the purposes of this subdivision the power to alter, amend, or revoke shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the alteration, amendment, or revocation takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. In such cases proper adjustment shall be made representing the interests which would have been excluded from the power if the decedent had lived, and for such purpose if the notice has not been given or the power has not been exercised on or before the date of his death, such notice shall be considered to have been given, or the power exercised, on the date of his death.

"(3) The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;"

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 805. ESTATE TAXES—REVOCABLE TRANSFERS.

(a) Section 302 (d) (1) of the Revenue Act of 1926, as amended, is amended to read as follows:

"(d) (1) To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death."

(b) Except in the case of transfers made after the date of the enactment of this Act, no interest of the decedent of which he has made a transfer shall be included in the gross estate under such section 302 (d) (1) unless it was includible under such section before its amendment by this section.

Regulations 80 (1937 Ed.):

ART. 20. *Transfers with power to change the enjoyment.*—(a) *Transfers included.*—Subdivision (d) of section 302 of the Revenue Act of 1926, as amended, embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of dece-

dent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (See article 15.)

The addition to the subdivision, by section 805 of the Revenue Act of 1936, of the phrase to the effect that it is not material in what capacity the power was subject to exercise by the decedent or by the other person or persons in conjunction with the decedent, is considered as merely declaratory of the meaning of the subdivision prior to the addition of the phrase.

The second phrase added by amendment in 1936 (namely, "without regard to when or from what source the decedent acquired such power") is not considered declaratory of the meaning of the subdivision prior to the amendment in a case in which no one of the powers enumerated in the subdivision was reserved at the time of the making of the transfer, but one or more thereof was conferred subsequent thereto (whatever the source from which conferred) without any understanding, expressed or implied, had in connection with the making of the transfer that such power or powers should be later conferred.

The third change made in the subdivision by the Revenue Act of 1936 consisted of the addition of the words "or terminate" following the words "to alter, amend, revoke." Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment. A power to terminate capable of being so exercised as to revest

in the decedent the ownership of the transferred property or an interest therein, or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to "revoke," and when otherwise so exercisable as to effect a change in the enjoyment, is the equivalent of a power to "alter."

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H. Rep. No. 2818, 74th Cong., 2d Sess., pp. 9–10:

Section 206 amends section 302 (d) (1) of the Revenue Act of 1926, as amended, relating to the inclusion in the gross estate of a decedent of the value of property, transferred by him by trust or otherwise, but subject to a power to alter, amend, or revoke. The changes made by this section are made necessary largely by reason of the decision of the United States Supreme Court in the case of *White* v. *Poor* (296 U. S. 98). Although in that case the decedent had created a trust which was at her death subject to a power to terminate, existing in the decedent as trustee in conjunction with two other trustees, nevertheless the Supreme Court held that section 302 (d) did not require the inclusion, in the gross estate of the decedent of the property subject to such power of termination. The Court held that the power to terminate existing in the decedent at the date of her death resulted from the action of the other trustees and not by virtue of any power reserved to herself as settlor in the original estate. The case, therefore, suggests that section 302 (d) may be circumvented in many ways so long as the power to alter, amend, revoke, or terminate does not accrue to the settlor by virtue of the reservation in the trust instrument.

It is, therefore, provided that section 302 (d) covers a power whether created at the time of transfer or thereafter arising from any source and whether exercisable in an individual or representative capacity. To some extent, it is believed this amendment is declaratory of existing law. To the extent that it is not so declaratory, it is prospective and will apply to transfers made after the date of enactment of the act. Section 206 also covers a power whether it exists jointly in the decedent and some other person or whether it exists only in some other person. This will apply to transfers made after the enactment of the act, since it is not declaratory of existing law. The Supreme Court in the case of *Helvering* v. *City Bank Farmers Trust Co.* (296 U. S. 85) has sustained the constitutionality of subjecting to the estate tax property which is subject to a power to be exercised by the decedent in conjunction with any person. Its conclusion was reached on the ground that the end sought to be attained was the prevention of tax avoidance by the device of qualifying the right to exercise the power so that it must be exercised in conjunction with another person who, however, would be selected by the decedent so as to comply with the decedent's wishes as to when and how the power should be exercised. If the person is selected to exercise the power with the decedent because he will comply with the decedent's wishes, it makes little difference whether the tax avoidance is effected by vesting in such person alone the sole right to exercise the power. In either case, such exercise will be governed by the wishes and directions of the decedent and will be sub-

ject to his control. It should, therefore, be embraced in section 302 (d).

Another change made in subsection (a) of section 206 has been to expressly include a power to terminate along with the powers to alter, amend, or revoke. In the case of *White* v. *Poor, supra,* the Supreme Court did not pass on the question of whether the power to terminate was included in the language relating to a power "to alter, amend or revoke." Since in substance a power to terminate is the equivalent of a power to revoke, this question should be set at rest. Express provision to that effect has been made and it is believed that it is declaratory of existing law.

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